NO. 14-13-00748-CV

IN THE COURT OF APPEALS FOR
THE FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

IN RE JONATHAN DAY, ET AL., RELATORS

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature of the proceedings: The Education Code tasks the Honorable Ed Emmett, County Judge of Harris County, Texas, with determining whether a valid petition has been filed before he orders an election on the issue of whether to levy an equalization tax. *See* TEX. EDUC. CODE § 18.07-App.

Exercising this discretion, Judge Emmett declined to order an election. *See* Petition for Writ of Mandamus at App. A ¶ 9.

Relators filed this mandamus action to compel Judge Emmett to order an election. *See* Petition for Writ of Mandamus at vi.

Proceedings below: Judge Emmett declined to order the election.

STATEMENT OF JURISDICTION

Texas Election Code § 273.061 provides jurisdiction over a petition for writ of mandamus "to compel the performance of any duty imposed by law in connection with the holding of an election . . . ." However, jurisdiction to review the performance of a discretionary duty imposed by law exists only to the extent to which discretion was clearly abused. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). Additionally, Relators did not file first in a district court, where issues of fact could have been resolved. *In re Angelini*, 186 S.W.3d 558, 560 (Tex. 2006) ("'It is well established Texas law that an appellate court may not deal with disputed areas of fact in an original mandamus proceeding.'") (quoting *Brady v. Fourteenth Court of Appeals,* 795 S.W.2d 712, 714 (Tex. 1990)).

ISSUES PRESENTED

1. With regard to a county-wide equalization tax, Chapter 18-App. Of the Texas Education Code requires a county judge to determine (1) whether a petition for tax election "legally pray[s] for the authority to levy and collect an equalization tax" and (2) whether the petition complies with the statutory requirements in Section 18.07, before he orders an election. Does that provision require a county judge to whom the petition is submitted to exercise discretion in determining whether the petition complies with the Code?

2. Did Judge Emmett abuse his discretion in this case, given that (a) the Legislature has provided the language that an equalization tax ballot measure must substantially follow and (b) Relators' proposed measure conflicts with that language and with the Education Code?

STATEMENT OF FACTS

In May of 2013, the Citizens for School Readiness, a political action committee, circulated a petition to authorize a one cent tax for early childhood education. *See* Tab J. The petition proposed to submit the following ballot language to the voters of Harris County, Texas at the November 5, 2013 election:

> A petition to authorize the Harris County Department of Education to levy and collect an additional ad valorem tax in an amount not to exceed $.01 per $100 assessed valuation to be used solely and exclusively for early childhood education purposes to improve success of children in kindergarten and beyond. Petitioners pray that the County Judge of Harris County, Texas, pursuant to Sections 18.07 and 18.09, Texas Education Code, immediately order an election to be held on November 5, 2013, at which election the following ballot shall be submitted to the voters of Harris County, Texas:
>
> FOR HARRIS COUNTY DEPARTMENT OF EDUCATION ADDITIONAL TAX NOT EXCEEDING ONE (1) CENT ON THE $100 VALUATION TO BE USED SOLELY AND EXCLUSIVELY FOR EARLY CHILDHOOD EDUCATION PURPOSES.
>
> AGAINST HARRIS COUNTY DEPARTMENT OF EDUCATION ADDITIONAL TAX NOT EXCEEDING ONE (1) CENT ON THE $100 VALUATION TO BE USED SOLELY AND

EXCLUSIVELY FOR EARLY CHILDHOOD EDUCATION PURPOSES.

The petition purports to be brought under Sections 18.07 and 18.09 of the Education Code. Section 18.07 requires that a county judge order an election "in compliance with the terms of the petition" after he determines that the petition (1) legally prays for the authority to levy and collect an equalization tax and (2) fulfills the requirements of this Section, which includes a requirement that the petition be signed by the number of voters indicated in Section 18.07(b). Section 18.09 provides the language that the ballot, and thus the petition, must use.[1]

On August 5 and August 9, Harris County Judge Ed Emmett sought guidance from the Texas Attorney General on whether the petition satisfied the Education Code. *See* Tab K. On August 22, the Texas Conference of Urban Counties submitted a letter to the Attorney General explaining their position that the petition did not satisfy the Education Code's requirements and that, therefore, "[t]he Harris County Judge cannot order an election." *See* Tab L. In anticipation that the Attorney General might not rule before his decision was required (which he did not), Judge

[1] Section 18.07 requires that, if ordered, the election be held "in compliance with the terms of the petition."

Emmett requested an opinion from a well-respected Education Law expert, Mr. William C. Bednar. *See* Tab K at Ex. 4. After a thorough analysis of Chapter 18, Mr. Bednar opined that the petition "squarely conflicts with the basic statutory scheme of Chapter 18." *See* Tab K at Ex. 4.

Then, on August 26, pursuant to Section 18.07 of the Texas Education Code, Judge Emmett declined to order an election.

If this matter is to be included on the November 5, 2013 election, Stan Stanart, the County Clerk of Harris County, must be informed of the exact language to be used no later than 9:00 a.m. on September 9, 2013. *See* Tab L.

SUMMARY OF THE ARGUMENT

Texas law is clear that a county judge's discretionary decision is not subject to mandamus absent a clear abuse of discretion. Here, Relators allege no such abuse. In fact, Relators openly admit that Judge Emmett is "a conscientious and committed public servant" and note that his wisdom is not in question. *See* Petition for Writ of Mandamus at 1. As such, because the statute in question, which must be strictly complied with, imposes a discretionary duty upon Judge Emmett, mandamus is not proper.

Section 18.07(a) vests the County Judge with the duty to determine whether a petition for tax election is sufficient. Specifically, Section 18.07(a) provides that he must determine whether the petition: (1) "legally prays for the authority to levy and collect an equalization tax" and (2) complies with the other requirements contained in Section 18.07. Thus, even if he determines that a petition contains the required minimum number of signatures, a county judge's job is not done, for he must also determine whether the petition complies with the other requirements set forth in Chapter 18 of the Education Code.

Some of the requirements that must be met for a petition to be sufficient include: the petition must contain the statutorily-required number of signatures, those signatures must be valid, the petition must pray for a tax rate authorized by statute, the tax prayed for must be statutorily-authorized, and the language in the petition must track the statutorily-mandated ballot language. Ultimately, Judge Emmett determined that the petition was not sufficient.

When, as here, a county judge exercises his statutory duty to determine the sufficiency of a petition, his decision is unreviewable so long as he acts in good faith. Relators concede that they are not questioning "the wisdom of the County Judge, who is a conscientious and committed public servant." Petition for Writ of Mandamus at 1. Thus, his decision must stand.

ARGUMENT & AUTHORITIES

I. Standard of Review.

"The determination by a governing body of the sufficiency of a petition to hold an election is generally a discretionary function which may not be the subject of mandamus." *Vinson v. Burgess*, 775 S.W.2d 509, 511 (Tex. App.—Fort Worth 1989, no pet.); *see King v. Guerra*, 1 S.W.2d 373, 376 (Tex. Civ. App.—San Antonio 1927, writ ref'd) ("It is the settled general rule, in this as well as in other jurisdictions, that mandamus will not lie to control or review the exercise of the powers granted by law to "any court, board or officer," when the act complained of calls for or involves the exercise of discretion upon the part of the tribunal or officer.")

When a county judge is tasked with determining the sufficiency of a petition, "no one else can exercise such discretion or discharge such duties," *Williams v. Glover*, 259 S.W. 957, 961 (Tex. Civ. App.—Waco 1924, no writ) and "his decision cannot be dictated or attacked in court so long as he acts in good faith." *Todd v. Helton*, 495 S.W.2d 213, 215 (Tex. 1973); *see Hoffman v. Elliott*, 473 S.W.2d 675, 677 (Tex. Civ. App.—Houston 1971, writ ref'd n.r.e.) ("The county judge alone can determine the issues of fact prerequisite to calling the election. The district court did not err in refusing

to issue the writ of mandamus."); *see also City of El Paso v. Tuck*, 282 S.W.2d 764, 766 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.) (noting the "general rule" that officer with whom a petition for election is filed "performs a judicial and not a ministerial function" and finding that the courts were "without power to set aside the findings of the County Judge") (quoting 29 C.J.S. *Elections* § 69, at 92).

II. Judge Emmett correctly performed his duties under the Texas Education Code.

"As the Supreme Court has declared: 'When a statute which authorizes a special election for the imposition of a tax prescribes the form in which the question shall be submitted to the popular vote, we are of the opinion that the statute should be strictly complied with." Tex. Atty Gen. Op. No. JM-574 (1986) (quoting *Reynolds Land & Cattle Co. v. McCabe*, 12 S.W. 165, 165 (Tex. 1888), and citing *Coffee v. Lieb*, 107 S.W.2d 406, 411 (Tex. Civ. App.—Eastland 1937, no writ)); *see West End Rural High Sch. Dist. of Austin Cnty. v. Columbus Consol. ISD of Colorado Cnty.*, 221 S.W.2d 777 (Tex. 1949); *Mesquite ISD v. Gross*, 67 S.W.2d 242 (Tex. 1934); *Wright v. Bd. of Trustees of Tatum ISD*, 520 S.W.2d 787, 792 (Tex. Civ. App.—Tyler 1975, writ dism'd); Tex. Atty. Gen. Op. No. JM-747 (1987).

Section 18.07(a) of the Texas Education Code provides in relevant part that "[o]n receipt of a petition ***legally praying*** for the authority to levy and collect an equalization tax ***and*** fulfilling the requirements of this Section, the county judge … shall immediately order an election." TEX. EDUC. CODE § 18.07(a)-App. (West 2013) (emphases added). Thus, before ordering such an election a county judge must determine whether the petition is sufficient. Does the petition contain a sufficient number of valid signatures? Does the petition pray for a tax that is authorized by statute? Does the petition contain the statutorily-required language to be used on the ballot?

Relators ignore the plain language of Section 18.07 and contend that, once it has been determined that a petition has sufficient signatures, the County Judge must ignore his other statutorily-imposed obligations and blindly order an election.

A. The determination of the sufficiency of the petition is a matter of discretion not subject to mandamus.

Under certain statutes, Texas voters can by valid petition submit an issue for election. When they do so, local officials often become *de facto* "ministerial officers in the legislative process, burdened with the

mandatory obligation of performing the duties imposed upon them incidental to carrying out the initiative procedure." *Glass v. Smith*, 244 S.W.2d 645, 653 (Tex. 1951). Those statutes contain the kind of language that Relators would like Section 18.07 to contain. *See, e.g.* former Section 18.21 of the Education Code (now repealed) ("the County Judge of such counties shall, upon the presentation to him of a petition signed by 150 or more of the qualified taxpaying voters of such county praying for such an election, order an election…."). The statutes at issue in the cases relied upon by Relators also provide good examples of the language used by the Legislature when it intends an official to perform a purely ministerial role. *See, e.g.,* TEX. REV. CIV. STAT. art. 1170 (the statute at issue in *Coalson v. City Council of Victoria*, 610 S.W.2d 744, 746 (Tex. 1980)) ("the governing body . . . shall, upon receiving a petition signed by qualified voters in such city, town or political subdivision in number not less than five per cent (5%) thereof or 20,000 signatures, whichever is less, submit any proposed amendment or amendments to such charter."); TEX. LOC. GOV'T CODE § 9.007 (the statute at issue in *In re Robinson*, 175 S.W.3d 824, 829 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding) ("As soon as practicable after a municipality adopts a charter or charter amendment, the mayor or

chief executive officer of the municipality shall certify to the secretary of state an authenticated copy of the charter or amendment under the municipality's seal showing the approval by the voters of the municipality.").

Section 18.07, however, requires the County Judge to fulfill a discretionary, *judicial* role: to determine the petition's legality before calling an election that could raise taxes. When a locality's taxing power is involved, "the county judge is vested with power and authority to determine the sufficiency of such petition." *Williams v. Glover*, 259 S.W. 957, 961 (Tex. Civ. App.—Waco 1924, no writ). "No one else can exercise such discretion or discharge such duties." *Id*. "Much is necessarily left to [the county judge's discretion]." *Id*.

The plain language of Section 18.07 instructs Judge Emmett not simply to review signature counts, but to determine whether a petition legally prays for taxing authority. *See Robinson*, 175 S.W.3d at 831 (noting that plain meaning of statute is starting place to determine legislative intent). Beyond a tally—and even beyond ensuring that the petition tracks the language in Section 18.09—the Legislature demands a determination of a petition's legality where equalization taxes are involved. Relators do not

challenge the Legislature's ability to grant Judge Emmett the authority to make that determination, notwithstanding the people's substantial, but not unlimited, power to petition their government. *See Glass*, 244 S.W.2d at 248 (disagreeing with lower court's holding that "courts are duty bound to prevent all interference with the political power of the people").

Every authority Relators use to argue that Judge Emmett's duty was ministerial is therefore unhelpful. In none of their cited cases was the relevant local official required to act only on *legal* petitions.[2]

Because Judge Emmett had to exercise discretion to evaluate the legality of Relators' petition in light of existing law and the express language of Chapter 18, Relators can only attack his finding if he abused that discretion. *Anderson*, 806 S.W.2d at 793; *see Vinson*, 775 S.W.2d at 511 (noting that discretionary act can only be challenged as fraudulent, capricious, or unfair). However, Relators recognize that Judge Emmett is

[2] *See Anderson*, 806 S.W.2d at 793 (statute required mayor to act based on number and proportion of petition signatures alone; he had no authority to determine legality of petition); *Coalson*, 610 S.W.2d at 747 (city council and mayor had no statutory authority to evaluate legality of contested amendments); *Glass*, 244 S.W.2d at 648 (city executive officials had no authority under city charter to act only on legal petitions and therefore could not evaluate legality of contested petition); *Robinson*, 175 S.W.3d at 829 (mayor had no discretion under statute to determine legality of charter amendments passed by election); *In re Roof*, 130 S.W.3d 414, 415–16 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding) (city secretary had no authority to evaluate legality of petition where statute required her to submit petition to voters if one condition, sufficient signatures, was met).

"a conscientious and committed public servant" and note that his wisdom is not in question. Petition for Writ of Mandamus at 1. No fraud, caprice, or unfairness is alleged that might taint Judge Emmett's decision, which is therefore not subject to mandamus review.

B. In any event, the petition does not substantially comply with the requirement of Section 18.09(c) of the Texas Education Code.

Judge Emmett had a duty to strictly comply with Chapter 18. "[I]n the instance of a special election, the exercise of a grant of authority to call an election must be in strict conformity with the provisions of the legislative grant." Tex. Atty. Gen. Op. No. JM-574 (1986) (citing *West End Rural High Sch. Dist. of Austin Cnty.*, 221 S.W.2d 777; *Gross*, 67 S.W.2d 242 (Tex. 1934)). This was especially true because a locality's taxing power was involved. *City of Forth Worth v. Davis*, 57 Tex. 225, 1882 WL 9492, at *9 (1882) (in an election "affecting [the] power to tax," local officials "must pursue with strictness the mode prescribed by the legislature.").

The plain language of Chapter 18 required Judge Emmett to deny the petition. This Court has previously recognized that when interpreting a statute, the primary objective is to give effect to the Legislature's intent. *Epco Holdings, Inc. v. Chicago Bridge & Iron Co.*, 352 S.W. 3d 265, 270 (Tex.

App.—Houston [14th Dist.] 2011, no pet.). To determine legislative intent, the Court presumes "that the Legislature chooses a statute's language with care, including each word for a purpose, while purposefully omitting words not chosen." *Id*.

Section 18.09(c) of the Texas Education Code provides express language for the form of the ballot:

> The form of the ballot shall be substantially as follows: If no specific tax rate was set in the petition, the proposition shall read: "For county tax" and "Against county tax." If a specific tax rate was incorporated in the petition, the proposition shall read: "For county tax not exceeding _____ cents on the $100 valuation" and "Against county tax not exceeding _____ cents on the $100 valuation."

TEX. EDUC. CODE § 18.09(c)-App. (West 2013). "By providing exact ballot language, the statute implicitly excludes other issues from being submitted on the ballots." *Wichita County v. Bonnin*, 268 S.W.3d 811, 819 (Tex. App.—Fort Worth 2008, pet. denied) (interpreting TEX. LOC. GOV'T CODE § 152.072(e) which also provides express language to be included on the ballot).

As is evident in the petition, Relators' proposed ballot language differs from the express language of Section 18.09(c) in three respects. First,

petition uses the term "Harris County Department of Education" as opposed to "Harris County." Second, the petition classifies the tax as an "additional tax." Third, the petition proposes that this "additional tax" be "used solely and exclusively for early childhood education purposes." Even if the substitution of "Harris County Department of Education" as opposed to "Harris County" can be deemed substantial compliance with the requirements of Section 18.09(c), the other two deviations are clearly not in line with the intent and purpose of the Education Code.

i. Chapter 18 of the Texas Education Code does not authorize an "additional" tax.

Describing the requested tax as "additional" is a significant departure from the statute because there is no authority in Chapter 18 for more than one tax. Every statutory reference to the tax in Chapter 18 uses the singular "tax" rather than the plural taxes. *See, e.g.,* TEX. EDUC. CODE § 18.01-App. (West 2013) ("a countywide equalization tax"); *id*. § 18.07-App. ("an equalization tax"); *id*. § 18.09-App. ("county tax"); *id*. § 18.10-App. ("the tax"); *id*. § 18.11-App. ("a tax"); *id*. § 18.12-App. ("the countywide equalization tax"); *id*. § 18.13-App. ("the countywide equalization tax"); *id*.

§ 18.14-App. ("the equalization tax"); *id*. § 18.26-App. ("the tax"); *id*. § 18.29-App. ("the tax herein provided for").

There is no basis in Chapter 18 for the imposition of an "additional tax." Moreover, the language in the proposed ballot creates a confusion as to the total amount of the tax. In 1937, the voters of Harris County authorized a $.01 tax. Here, Relators are actually asking for a $.02 tax, by increasing the originally-voted-for tax by $.01, but the proposed ballot conveniently omits such information, despite being required by Section 18.09(c). Indeed, the plain language of Section 18.09(c) was drafted to avoid such confusion by requiring the ballot to plainly state the ***total*** amount of the equalization tax. Because Relators' proposed ballot did not comply with the requirements of Section 18.09(c), it is not sufficient.

ii. The petition's qualifying language, that the tax would be used solely and exclusively for early childhood education purposes, substantially deviates from the statutory language in Section 18.09(c).

Finally, the petition's attempt to limit the use of the tax solely and exclusively for early childhood education purposes conflicts with the basic statutory scheme of Chapter 18. The concept embodied in Chapter 18 was the creation of a county unit system with a "countywide equalization tax" TEX. EDUC. CODE § 18.01-App. (West 2013). The general management,

supervision and control of the county unit system shall be vested in the county board of education. *Id*. § 18.06-App. The board of education shall distribute the moneys collected from the equalization tax according to the express provisions of Section 18.14, which requires that any funds collected under Chapter 18 "be distributed to the common and independent school districts of the county on the basis of the average daily attendance for the prior year." *Id*. § 18.14-App. As such, while Chapter 18 may provide the legal authority for the creation of an "equalization tax," the use of said funds is left to the discretion of the board of education.

In fact, the petition does not pray for an "equalization tax" at all. Under Section 18.28 of the Education Code, an "equalization tax" constitutes funds that may only be used for (1) the equalization of educational opportunities and (2) for payment of administration expense. *Id*. § 18.28-App. The tax prayed for in the petition does not meet these requirements, and instead seeks to impose a tax that is to be used solely and exclusively for early childhood education purposes. Chapter 18 does not permit such a tax, but instead expressly prohibits it. Section 18.26 states that the tax provided for in Chapter 18 "shall never be levied,

assessed or collected for any purpose other than those" specified in Chapter 18. *Id*. § 18.26-App.

In short, because Chapter 18 does not authorize a ballot proposing an "additional tax" to be "used solely and exclusively for early childhood education purposes," the proposed ballot does not legally pray for the authority to levy and collect an equalization tax.

In any event, Chapter 18 imposes a discretionary, not ministerial, duty upon Judge Emmett and, as such, his decision not to order an election should not be disturbed.

PRAYER

Accordingly, the Honorable Ed Emmett respectfully requests that the Court deny the mandamus, and for such other and further relief, general or special, at law or in equity, to which he is justly entitled.

Respectfully submitted,

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/s/ Katharine D. David

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ATTORNEYS FOR RESPONDENT, THE HONORABLE ED EMMETT, COUNTY JUDGE OF HARRIS COUNTY, TEXAS

CERTIFICATE

I certify that this document contains 3,381 words, apart from those parts of the brief excluded by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Katharine D. David
Katharine D. David

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above brief has been served on the following individuals by fax and first class mail on this the 3rd day of September, 2013:

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/s/ Katharine D. David
Katharine D. David

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IN RE JONATHAN DAY, ET AL., RELATORS

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ATTORNEYS FOR RESPONDENT, THE HONORABLE ED EMMETT, COUNTY JUDGE OF HARRIS COUNTY, TEXAS

INDEX TO APPENDIX

Respectfully submitted,

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/s/ Katharine D. David
Katharine D. David

TAB J

EARLY TO RISE!
EARLY EDUCATION FOR OUR KIDS' SUCCESS

PETITION TO AUTHORIZE A ONE CENT TAX FOR EARLY CHILDHOOD EDUCATION

A petition to authorize the Harris County Department of Education to levy and collect an additional ad valorem tax in an amount not to exceed $0.01 per $100 assessed valuation to be used solely and exclusively for early childhood education purposes to improve success of children in kindergarten and beyond. Petitioners pray that the County Judge of Harris County, Texas, pursuant to Sections 18.07 and 18.09, Texas Education Code, immediately order an election to be held on November 5, 2013, at which election the following ballot shall be submitted to the voters of Harris County, Texas:

FOR HARRIS COUNTY DEPARTMENT OF EDUCATION ADDITIONAL TAX NOT EXCEEDING ONE (1) CENT ON THE $100 VALUATION TO BE USED SOLELY AND EXCLUSIVELY FOR EARLY CHILDHOOD EDUCATION PURPOSES.

AGAINST HARRIS COUNTY DEPARTMENT OF EDUCATION ADDITIONAL TAX NOT EXCEEDING ONE (1) CENT ON THE $100 VALUATION TO BE USED SOLELY AND EXCLUSIVELY FOR EARLY CHILDHOOD EDUCATION PURPOSES.

Printed Name	Residence Address (No. Street, City, State, Zip)	Date Signed	Signature	Email	Voter Reg. No (If Available)

Paid for by Citizens for School Readiness, James Calaway - Treasurer.

Mail signed petition to: P.O. Box 3581, Houston, TX 77253
Call (713) 247-9600 for questions

HOU:3322657.1

TAB K

ORAL ARGUMENT REQUESTED

No. 14-13-00748-CV

IN THE COURT OF APPEALS FOR
THE FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

IN RE JONATHAN DAY, ET AL., RELATORS

AFFIDAVIT OF ED EMMETT

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ATTORNEYS FOR RESPONDENT, THE HONORABLE ED EMMETT, COUNTY JUDGE OF HARRIS COUNTY

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, personally appeared ED EMMETT, who, after being duly sworn, stated the following:

1. "My name is ED EMMETT. I am of sound mind, over the age of twenty-one (21) years, capable of making this affidavit, and have personal knowledge of the facts herein stated, which are true and correct.

2. I am the elected County Judge of Harris County, Texas.

3. On August 5, 2013, I requested an opinion from the Attorney General of Texas about (1) whether the Election Code allowed the citizens of Harris County to petition the County Judge to order an election to levy and collect an equalization tax and (2) whether the County Judge has the authority to deny the request if the language on the petition does not substantially follow the language of the statute set forth in Section 18.09. *See* Ex. 1.

4. I received a letter from the Attorney General of Texas informing me that he could not respond to my request because I was not an "authorized requestor" and advising that I contact the County Attorney to submit an opinion request on my behalf. *See* Ex. 2. I contacted the County Attorney and he then requested an opinion from the Attorney General of Texas. *See* Ex. 3.

5. Because I was informed that it was unlikely the Attorney General would issue an opinion before I decided whether or not to order an election, I requested an opinion from an education law expert. On August 23, I received his opinion that the petition, as worded, was not sufficient. *See* Ex. 4.

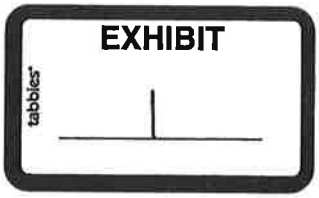
Further, Affiant sayeth not."

ED EMMETT

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this the 3rd day of September, 2013, to certify which witness my hand and seal of office.

Notary Public in and for the State of Texas

LEANNA ABBOTT
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
MAR. 12, 2016



August 5, 2013

The Honorable Greg Abbott
Attorney General of Texas
300 West 15th Street
Austin, Texas 78701

Re: Request for Opinion

Dear General Abbott:

A petition drive has been initiated to request that I place a matter on the November 5, 2013 ballot in Harris County. In anticipation of receiving more than the 78,000 signatures required by the statute, I am seeking your opinion on the following two questions:

1. Does Section 18.07 of the Education Code, although repealed in 1995, allow the citizens of Harris County to petition the County Judge to order an election to levy and collect an equalization tax?; and if so,

2. Does the County Judge have the authority to deny the request if the language on the petition does not substantially follow the language of the statute set forth in Section 18.09?

Equalization Tax

In 1995, the Texas Legislature repealed Chapter 18 of the Education but allowed the Board of School Trustees in Harris County and Dallas County to continue operating pursuant to the following: "A school district or county system operating under former Chapter 17, 18, 22, 25, 26, 27, or 28 on May 1st, 1995, may continue to operate under the applicable chapter as that chapter existed on that date. . . ." Education Code § 11.301(a). The Harris County Board of School Trustees has existed since before 1900 and in 1935, pursuant to Section 18.07, the voters of Harris County authorized a $0.01 maximum equalization tax per $100 valuation. Until 1935, no equalization tax existed in Harris County. The Legislature, through the adoption of 18.07, created a mechanism so that every county in the state could collect a county-wide equalization tax to be divided among the school districts in that county. Did the Legislature intend that, at any time after such an election, the voters of the county could have an additional election for an additional equalization tax? If so, it seems that the

language of the statute would have allowed a petition to authorize an "increase" in the existing equalization tax.

Furthermore, now that the statute has been repealed, does there continue to exist a right for the voters of Harris County to authorize an additional equalization tax? Section 11.301(a) which authorized the Harris County Board of School Trustees to continue operating does not have any language to allow for the continuation of the voters' rights to petition the County Judge for an election.

Ballot Language

Section 18.09(c) states: "The form of the ballot shall be substantially as follows: If no specific tax rate was set in the petition, the proposition shall read: "For county tax" and "Against county tax." If a specific tax rate was incorporated in the petition, the proposition shall read: "For county tax not exceeding _____ cents on the $100 valuation" and "Against county tax not exceeding _____ cents on the $100 valuation." The petition, as drafted and currently being circulated, requests that the following be submitted to the voters of Harris County: "For Harris County Department of Education additional tax not exceeding one (1) cent on the $100 valuation to be used solely and exclusively for early childhood education purposes" and "Against Harris County Department of Education additional tax not exceeding one (1) cent on the $100 valuation to be used solely and exclusively for early childhood education purposes."

The Harris County Department of Education is an assumed name adopted by the Harris County Board of School Trustees. The proposed petition ballot language differs from the statutory language authorized in two significant ways. First of all, the proposed language in the petition refers to an "additional" tax. There is no authority in the statute for an "additional" tax and if the supporters of the petition drive desired to increase the current one cent tax authorized for the Harris County Board of School Trustees, the ballot language should have been for a tax of two cents on the $100 valuation. Secondly, the petition language seeks to limit the Harris County Board of School Trustees use of this tax "exclusively for early childhood education purposes." The statutory language set forth in Section 18.09 does not appear to allow the County Judge to order an election that will limit the Board of School Trustees use of the equalization tax.

In *Davenport v. Commissioners' Court of Denton County*, 557 S.W.2d 530 (Tex. App – Texarkana 1977) a conflict between statutory language and ballot language dealing with a local option liquor election caused the court to void the election. In relying on an opinion from the El Paso Court of Appeals, the court concluded, "The El Paso court's opinion showed reliance was placed upon the reasoning and conclusions expressed in several prior attorney general opinions and quoted with approval from one of those opinions where it was said, '. . . specific statutory wording must be used in the petition, in the election order and on the ballots, in order to have a valid election.' " *Id.* at 532. The language in the petition fails to follow the statutory language of Section 18.09 and if the County Judge follows the language of the statute, he will not be following the language of the petitions.

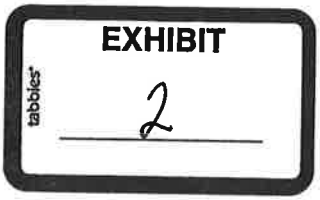
In order to achieve the purposes of the petitioners, the County Judge would have to liberally construe the statutory language of 18.09 to allow "additional" in the ballot language or to impose a limitation on the Board of School Trustees. This interpretation would alter the plain meaning of the statute. In *Methodist Hospital of Dallas v. Mid-Century Insurance Company of Texas*, 259 S.W. 3d 358, (Tex. App. – Dallas 2008), although the court was interpreting the statutory requirements of a lien notice, it agreed that the plain meaning of statutory language could not be altered. "Even if we liberally construe a statute to achieve its purposes, we may not enlarge or alter the plain meaning of the statutory language." *Id.* at 360.

In conclusion, I would appreciate your guidance on whether the voters of Harris County, pursuant to Section 18.07 of the Education Code have the right to petition me to put this matter on the November 5, 2013 ballot and if so, can I deny the request based upon the failure of the petition to use the statutory language. Lastly, since I will have to order this election on August 26, 2013, the last day for any matter be placed on the ballot, I would greatly appreciate any advice that could be provided on an expedited basis.

Sincerely,

Ed Emmett
County Judge

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT



August 9, 2013

The Honorable Ed Emmett
1001 Preston Ste. 911
Houston, TX 77002

Dear Judge Emmett:

Thank you for your recent letter. We appreciate your contacting the Office of the Attorney General.

As you may know, the role of this office is to advise and represent state entities and interests as specified in the Texas Government Code. Therefore, the Office of the Attorney General is unable to address your concerns in the manner you have requested.

An attorney general opinion is a written interpretation of existing law where a legal issue is ambiguous, obscure or otherwise unclear. Opinions interpret existing laws in accordance with all applicable statutes and the Constitutions of the United States of America and the state of Texas.

The Texas Government Code Section 402.042 indicates to whom the Office of the Attorney General may provide a legal opinion. Opinions are written only at the request of certain state officials, defined as "authorized requestors." Please understand that the Office of the Attorney General is prohibited by law from providing legal opinions to anyone other than authorized requestors. You may wish to contact your County Attorney, who would be an authorized requestor, about submitting an opinion request on your behalf.

You can read about the opinion process, find a list of authorized requestors and research opinions issued by this office in the Opinion Section of our website at www.texasattorneygeneral.gov/opin/.

Again, thank you for writing. Please feel free to contact the Office of the Attorney General if we may be of further assistance.

Sincerely,

Bill Stephens
Public Information & Assistance
Office of the Attorney General of Texas

The Office of Vince Ryan
County Attorney

August 9, 2013

The Honorable Greg Abbott
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

Certified Mail Return-Receipt Requested

Attention: Opinion Committee

Re: Whether the County Judge is authorized to deny a petition to order an election to levy and collect an equalization tax for the Harris County Department of Education and related questions; C.A. File No. *13GEN1222*

Ladies and Gentlemen:

We request your opinion as to whether the Harris County Judge is authorized to deny a petition to order an election to levy and collect an equalization tax for the Harris County Department of Education and related questions. Our Memorandum Brief is attached. As August 26 is the deadline for calling an election to be held on November 5, 2013, we respectfully request your expedited review and opinion on this matter. This request is to replace the request sent by the Harris County Judge on August 6.

Sincerely,

VINCE RYAN
County Attorney

By:
MARVA GAY
Assistant County Attorney

Approved:
ROBERT SOARD
First Assistant County Attorney

1019 Congress, 15th Floor • Houston, Texas 77002 • Phone: 713-755-5101 • Fax: 713-755-8924

MEMORANDUM BRIEF

This Memorandum Brief is presented in connection with whether the Harris County Judge is authorized to deny a petition to order an election to levy and collect an equalization tax for the Harris County Department of Education (HCDE). A petition drive has been initiated to request that the County Judge place a matter on the November 5, 2013 ballot in Harris County. In anticipation of receiving more than the 78,000 signatures required by the statute, we seek your opinion on the following questions posed by the Harris County Judge.

1. Does section 18.07 of the Texas Education Code, repealed in 1995, allow the citizens of Harris County to petition the County Judge to order an election to levy and collect an equalization tax?, and, if so,
2. Does the County Judge have the authority to deny the request if the language on the petition does not substantially follow the language of the statute set forth in section 18.09 of the Texas Education Code?
3. Does the language proposed by petitioners substantially follow the language of the statute set forth in section 18.09 of the Texas Education Code?, and if it does not,
4. Does the County Judge have the authority to place on the ballot the language of the statute set forth in section 18.09 of the Texas Education Code although the petitioners seek different language?

We ask for your expedited review as August 26, 2013 is the deadline for calling an election to be held on November 5, 2013.

Equalization Tax

In 1995, the Texas Legislature repealed chapter 18 of the Texas Education Code but allowed the Board of School trustees in Harris County and Dallas County to continue operating pursuant to the following: "A school district or county system operating under former Chapter 17, 18, 22, 25, 26, 2, or 28 on May 1st, 1995, may continue to operate under the applicable chapter as that chapter existed on that date. . ." Tex. Educ. Code Ann. § 11.301(a). The Harris County Board of School Trustees has existed since before 1900 and in 1937, pursuant to section 18.07 of the Texas Education Code, the voters of Harris County authorized a $0.01 maximum equalization tax per $100 valuation. Until 1937, no equalization tax existed in Harris County. The Legislature, through the adoption of section 18.07 of the Texas Education Code, created a mechanism so that every county in the state could collect a countywide equalization tax to be divided among the school districts in that county.

The Harris County Department of Education (HCDE) is the assumed name of the County School Trustees of Harris County. (Harris County Clerk's File No. 1103873). The Department of Education is a political subdivision of the State of Texas and works independently of the County Government of Harris County. *See* MGT of America, Inc., *Performance Review of the Harris County Department of Education: Final Report, 2010 at 28.*

HCDE acts as a county unit system of education which is "a method by which the voters of a county may, without affecting the operation of any existing school district within the county, create an additional countywide school district which may exercise in and for the entire territory of the county the taxing power conferred on school districts by article VII, section 3 of the Texas Constitution, for the purpose of adopting a countywide equalization tax for the maintenance of the public schools." Tex. Educ. Code Ann. § 18.01.

The statutory powers and duties for HCDE can be found in chapters 17 and 18 of the Texas Education Code. HCDE is granted the broad power to "perform any other act consistent with law for the promotion of education in the county." Tex. Educ. Code Ann. § 17.31(a).

Voters have authorized a maximum tax rate for HCDE to be set at no more than one cent on one hundred dollars valuation for taxable property in Harris County. For the 2012 tax year, the HCDE board approved a tax rate of 0.006617, according to the Truth in Taxation Summary, Mike Sullivan, Tax Assessor-Collector. (http://www.hctax.net/Property/JurisdictionTaxRates.)

Chapter 18 of the Texas Education Code authorizes a countywide school district to levy and collect an equalization tax provided a petition for a tax election is prepared and presented to the County Judge. The petition must be signed by "legally qualified taxpaying voters of the county" in a number equal to at least 10 percent of those voting for governor at the last preceding general election. Tex. Educ. Code Ann. § 18.07(b) and § 18.07(b)(2). The petition may pray for authority to levy and collect an equalization tax at any specified rate not in excess of 50 cents on the $100 property valuation. Tex. Educ. Code Ann. § 18.07(b) and 18.12.

On receipt of a petition legally praying for the authority to levy and collect an equalization tax and fulfilling the requirements of this section, the county judge of any county that has adopted the county-unit system shall immediately order an election to be held throughout the county in compliance with the terms of the petition. *See* Tex. Educ. Code Ann. § 18.07(a).

If the petition specifies a rate, the county judge shall incorporate that rate in his order Tex. Educ. Code Ann. § 18.08(a). The county judge must give notice of the election by publication of the order at least 20 days prior to the election in a newspaper published in the county. Tex. Educ. Code Ann. § 18.08(b).

According to the Office of the Secretary of State, there were a total of 788,234 votes cast for governor in Harris County for the 2010 general election. *Available at* http://elections.sos.state.tx.us/elchist.exe. The number of valid signatures needed for the calling of an election would be ten percent of 788,234 or 78,824.

A one-time election

Chapter 18 of the Texas Education Code authorizes a countywide school district to levy and collect an equalization tax at any specified rate not in excess of 50 cents on the $100 property valuation. Did the Legislature intend that, at any time after such an election, the voters of the county could have an additional election to add to the tax rate provided the rate is not in excess of 50 cents on the $100 property valuation? The language of the statute does not specifically allow a petition to authorize an increase in the county equalization tax. However, nothing in the Texas Education Code prohibits multiple elections to authorize raising the tax rate as long as the rate is not in excess of 50 cents on the $100 property valuation.

Furthermore, although repealed, chapter 18 of the Texas Education Code remains operative for HCDE. "A school district or county system operating under former Chapter 17, 18, 22,.25, 26, 27,, or 18 on May 1st, 1995, may continue to operate under the applicable chapter as that chapter existed on that date . . ." Tex. Educ. Code Ann. § 11.301. Since the statute has been repealed, does there continue to exist a right for the voters of Harris County to authorize an increased or additional equalization tax? Under section 11.301(a) of the Texas Education Code, which authorized the Harris County Board of School Trustees to continue to operate, do the voters continue to have a right to petition of the County Judge for such an election?

Ballot language

Does the language in the petition fail to follow the statutory language of section 18.09 of the Texas Education Code and, if the County Judge follows the language of the statute, would the County Judge be diverging from the language of the petition?

Section 18.09(c) reads:

> The form of the ballot shall be substantially as follows: If no specific tax rate was set in the petition, the proposition shall read: "For county tax" and "Against county tax." If a specific tax rate was incorporated in the petition, the proposition shall read: "For county tax not exceeding _____ cents on the $100 valuation" and "Against county tax not exceeding _____ cents on the $100 valuation."

Tex. Educ. Code Ann. § 18.09(c).

The petition, as drafted and being circulated, reads as follows:

> Petitioners pray that the County Judge of Harris County, Texas, pursuant to sections 18.07 and 18.09, Texas Education Code, immediately order an election to be held on November 5, 2013, at which election the following ballot shall be submitted to the voters of Harris County, Texas:
>
> > "For Harris County Department of Education additional tax not exceeding one (1) cent on the $100 valuation to be used solely and exclusively for early childhood education purposes."
> >
> > "Against Harris County Department of Education additional tax not exceeding one (1) cent on the $100 valuation to be used solely and exclusively for early childhood education purposes".

The proposed petition ballot language differs from the statutory language authorized in two potentially significant ways. First, the proposed language in the petition refers to an "additional" tax. There is no specific authority in the statute for an "additional" tax. The language could have said the tax was for two cents on the $100 valuation, which would have

been more specific. Also, the petition language seeks to limit the Harris County Board of School Trustees' use of this tax as "exclusively for early childhood education purposes." The statutory language set forth in section 18.09 does not appear to allow the County Judge to order an election that would include ballot language that will limit the Board of School Trustees' use of the equalization tax.

Texas Election Code Section 52.072(a) says: "Except as otherwise provided by law, the authority ordering the election shall prescribe the wording of the proposition that is to appear on the ballot." While the Education Code appears to dictate the language to appear on the ballot, some flexibility is permitted because of the use of the word "substantial."

The general rule is that when a statute that authorizes a special election for the imposition of a tax prescribes the form in which the question shall be submitted to popular vote, the statute should be strictly followed. But, if the form is not prescribed, then the language of the proposition submitted is not material so long as it substantially submits the question that the law authorizes with such definiteness and certainty that the voters are not misled. *Turner v. Lewie*, 201 S.W.2d 86, 91 (Tex. Civ. App.—Fort Worth 1947, dismissed); *Reynolds Land & Cattle Co. v. McCabe*, 72 Tex. 57, 12 S.W. 165, 166 (1888). The ballot should contain a description of the proposition submitted in such language as to constitute a fair portrayal of the chief features of the proposition, in words of plain meaning, so that it can be understood by persons entitled to vote. It is not customary to print the full text of the proposition on the ballot, but it is generally sufficient if enough is printed on the ballot to identify the matter and show its character and purpose. *England v. McCoy*, 269 S.W.2d 813, 817 (Tex. Civ. App.—Texarkana 1954, dismissed); *Turner v. Lewie*, 201 S.W.2d 91, supra., *Wright v. Board of Trustees of Tatum Independent School Dist.* 520 S.W.2d 787, 792 (Tex. Civ. App. – Tyler 1975, writ dism'd)

In *Davenport v. Commissioners Court of Denton County*, 557 S.W.2d 530 (Tex. App.—Texarkana 1977), a conflict between statutory language and ballot language dealing with a local option liquor election caused the court to void the election. In relying on an opinion from the El Paso Court of Appeals, the court concluded, "The El Paso court's opinion showed reliance was placed upon the reasoning and conclusions expressed in several prior attorney general opinions and quoted with approval from one of those opinions where it was said ". . . specific statutory wording must be used in the petition, in the election order and on the ballots, in order to have a valid election.'" *Id.* at 532.

Section 18.09(c) of the Education Code requires that the ballot language be "substantially" in the statutory form unlike the situation in the *Davenport* case, in which the applicable law mandated "exact language". "[T]he issue to be voted on shall be printed on the ballot in the *exact* language stated in Section 40 of this Act." *Id.*

In order to achieve the purposes of the petitioners, the County Judge would have to liberally construe the statutory language of section 18.09 of the Texas Education Code to allow "additional" in the ballot language or to impose a limitation on the Board of School Trustees. In *Methodist Hospital of Dallas v. Mid-Century Insurance Company of Texas*, 259 S.W.3d 358 (Tex. App.--Dallas 2008), although the court was interpreting the statutory requirements of a lien notice, the court agreed that the plain meaning of the statutory language could not be altered. "Even if we liberally construe a statute to achieve its purposes, we may not enlarge or alter the plain meaning of the statutory language." *Id.* at 360.

Section 18.07 of the Texas Education Code requires the County Judge to "immediately order an election to be held throughout the county *in compliance with the terms of the petition*" provided the County Judge has been presented with "a petition *legally praying* for the authority to levy and collect an equalization tax and *fulfilling the requirements of this section.*" Tex. Educ. Code Ann. § 18.07 (*emphasis added*).

If the County Judge were to alter the proposed ballot language, then he would no longer be ordering an election "in compliance with the terms of the petition." If the proposed ballot language is in substantially the form required by the statute, then the language proposed by petitioners could be placed on the ballot without injury to the intent of the statute.

To the extent that the wording would be such that it would have changed the result of the election, the language would be considered misleading and, hence, improper. However, if the language chosen to submit the measure to the voters is sufficient enough to identify the matter and show its character and purpose, it will suffice. *Dacus v. Parker*, 383 S.W.3d 557, 565 (Tex. App.—Houston [14th Dist.] 2012). "[S]tatutory enactments will be strictly enforced to prevent fraud, but liberally construed in order to ascertain and effectuate the will of the voters." *Varela v. Percales*, 184 S.W.2d 637, 639 (Tex. Civ. App.—El Paso 1944, no writ). Unless the failure to observe the strict letter of the law affected the result of the election, substantial compliance is sufficient. *Branaum v. Patrick*, 643 S.W.2d 745, 750 (Tex. App.—San Antonio 1982, no writ).

Whether the County Judge has been presented with a petition that legally prays for an election and fulfills the requirements of section 18.07 of the Texas Education Code must be determined by the County Judge. *City of El Paso v. Tuck*, 282 S.W.2d 764, 766 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.). (holding that county judge's refusal to call an election in response to a petition because he determined that the inhabitants of a territory had abandoned their effort to incorporate was not subject to review by an appellate court in the absence of fraud or arbitrary action). *See also Hoffman v. Elliott*, 473 S.W.2d 675 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref. n. r. e.) (holding that when county judge was presented with a statutory petition and satisfactory proof that the territory sought to be incorporated contained the requisite number of resident qualified electors, then the judge had no discretion as to whether to call an election—he must do so).

Validity of the underlying proposition

The official receiving the petition may not inquire as to the validity of the underlying proposition and when all procedural requirements for submission of a proposed ordinance have been met mandamus will issue to order an election. *Glass v. Smith*, 244 S.W.2d 645, 653 (Tex. 1951). The determination as to the validity of a proposal prior to the matter becoming law would "interfere with the exercise by the people of their political right to hold elections" *Id.* As the *Glass* court explained:

> If the courts into whose province the duty is committed by the Constitution to adjudge the validity or invalidity of municipal legislation will not themselves interfere with the legislative process how could they justify their inaction while ministerial officers, usually without judicial training, interrupted that process? The same cogent and persuasive reasons which prompt judicial non-interference with the legislative process should compel the courts in proper cases to prevent interference by others with that process. *Id.* at 644-45.

In *Coalson v. City Council of Victoria*, the Supreme Court rejected the City of Victoria's attempt to have a proposed charter amendment declared invalid because the ordinance, were it to become law, would be unconstitutional. The court said, "The declaratory judgment suit, at this stage of the proceedings, seeks an advisory opinion. The election may result in the disapproval of the proposed amendment. ... The election will determine whether there is a justiciable issue, at which time the respondents' complaints ... may be determined by the trial court. Coalson v. City Council of Victoria, 610 S.W.2d 744, 747 (Tex. 1980)

Similarly, in *Dacus v. Parker*, 2012 WL 2783181 (Tex. App. Houston—14th Dist. 2012), the court held that the voters' opposition to a pay-as-you-go fund for drainage systems and streets and the manner in which city was to implement the measure was a challenge against the measure itself rather than the ballot proposition, and such a challenge was not cognizable in an election contest.

Long standing Texas public policy favors the right of the people to petition their government as enunciated in article I, section 27 of the Texas Bill of Rights of the Texas Constitution:

> The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.

The Amarillo Court of Appeals declared the right to petition the government as constitutionally equivalent to the right of free speech:

> The right to petition in the Texas Constitution is inseparable from the right of free speech, and, as a general rule, the rights are subject to the same constitutional analysis; although the rights are distinct guarantees, they were cut from the same constitutional cloth, inspired by the same principles and ideals. *Clark v. Jenkins* 248 S.W.3d 418 (Tex. App.—Amarillo 2008, pet. denied)

This principle underpins the holding in *Arenas v. Board of Com'rs of City of McAllen*, 841 S.W.2d 957, 959 (Tex. App.—Corpus Christi 1992), in which the court ordered the City of McAllen to submit a proposition to the voters even though the petition included matters that were not within the applicable statute. The city commissioners found the petition was legally insufficient because the petition went beyond the statutory requirements of proposing minimum salaries for existing police officers and attempted to provide minimum salaries for non-existent classifications of police officers. The court disagreed and said:

> The power of initiative and referendum is the exercise by the people of a power reserved to them, and not the exercise of a right granted. *Arenas* at 959 quoting *Coalson v. City Council of Victoria*, 610 S.W.2d 744 (Tex. 1980).

The legislature has declared the public policy of the state of Texas is to give effect to the expressed intent of the people:

> Any question arising under provision of the Election Code should be decided with due consideration to the statutory objective that the will of the people shall prevail. Election Code, art. 1.01.

This policy is reflected in various cases dealing with claimed irregularities in the election process in which courts have declared that failures and irregularities in the observance of provisions of the statutes concerning such matters will not invalidate an election unless they have affected or changed the result. *Waters v. Gunn*, 218 S.W.2d 235, 237 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.) (citing *Hill v. Smithville Independent School Dist.*, Tex. Com. App., 251 S.W. 209; *Lightner v. McCord*, Tex. Civ. App., 151 S.W.2d 362).

Summary

We would appreciate your guidance on whether the voters of Harris County, pursuant to section 18.07 of the Texas Education Code have the right to petition the County Judge to put this matter on the November 5, 2013 ballot and, if so, may the County Judge deny the request based upon the failure of the petition to track the statutory language. If the proposed ballot language does not substantially comply with that of the statute, may the County Judge place on the ballot language that more closely follows that set forth in section 18.09 of the Texas Education Code?

As August 26, 2013 is the deadline for calling an election to be held on November 5, 2013, we respectfully request your expedited opinion on this matter.

Law Office of
William C. Bednar

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August 23, 2013

Via e-mail judgeemmett@gmail.com
The Hon. Ed Emmett
County Judge of Harris County
1001 Preston, Suite 911
Houston, TX 77002

Re: Petition for Additional Harris County Equalization Tax

Dear Judge Emmett:

You have requested my opinion on questions that have arisen in connection with a petition to authorize the Harris County Board of Education to levy and collect an "additional" property tax to be used for early childhood education purposes. Specifically, you inquire

1. Does Chapter 18 of the Texas Education Code[1], although repealed in 1995, continue to allow a citizens' petition to the county judge to order an election for the levy and collection of a county equalization tax?

2. Does the county judge have the authority or duty to act on the petition if the ballot wording of the petition is not substantially the same as the form of ballot specified in Section 18.09?

3. Does the ballot language of the petition in fact substantially follow the form of ballot prescribed in Section 18.09?

To begin, this is a property tax matter. As everyone is sharply reminded every fall when the property tax notices arrive, there is no "equity" when it comes to property taxes. As famously observed by the U. S. Supreme Court, the power to tax is the power to destroy. *M'Culloch v. Maryland*, 17 U. S. 316, 427 (1819). For good reason, then, it has long been a bedrock principle of Texas law that the power to tax may only be exercised by a subordinate governmental unit when delegated to it by the Constitution or the legislature, which power must be plainly and unmistakably conferred and strictly construed. *Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann*, 135 Tex. 280, 286, 142 S.W.2d

[1] All "Chapter" and "Section" references are to the Texas Education Code unless otherwise indicated.

945, 948-49 (1940), citing *Frosh v. City of Galveston*, 73, Tex. 401, 11 S.W. 402, 404 (1899). The Texas Attorney General has applied this principle broadly to the levying and collection of property taxes. Tex. Atty. Gen. Op. Nos. L94-016 (1994) at 2; JM-72 (1983) at 2. A correlative principle of equal force is that school officials have only those powers expressly granted or necessarily implied by statute, which must be exercised strictly in accordance with the mandatory direction of the statute. *Mesquite Indep. Sch. Dist. v. Gross*, 67 S.W.2d 242, 245 (Tex. 1934); Tex. Atty. Gen. Op. No. GA-0692 (2012). Whether such powers exist is purely a question of law. *Henry v. Kaufman County Dev. Dist. No. 1*, 150 S.W.3d 498, 503 (Tex. App.--Austin 2004, pet. granted, remanded by agreement).

Thus it is not to be lightly implied or inferred that a county board of education may levy or collect a property tax, or that a county judge in issuing an election order may use wording different from ballot language specified in a statute, or that use of the revenue of such a tax may be limited to the purpose stated in a citizen petition. Express or necessarily implied statutory authority would be required.

1. May citizens still petition for a tax under Chapter 18?

The county unit system is a very old component of Texas school funding, having been first enacted in 1839 and subjected to several modifications over the years. *Texas Public School Sesquicentennial Handbook* 56 *et seq.* (Texas Education Agency 2004). Although the Harris County school board has existed since before 1900, no equalization tax existed in Harris County until 1935. In an election that year, under the statutory predecessor to Section 18.07, the citizens of Harris County authorized a maximum equalization tax of one cent per $100 of assessed valuation, which has remained in effect to the present day. In 1995, the legislature repealed Chapter 18 but in the following language allowed county systems to continue to operate:

> A school district or county system operating under former chapter 17, 18, 22, 25, 26, 27 or 28 on May 1st, 1995, may continue to operate under the applicable chapter as that chapter existed on that date." TX. EDUC. CODE ANN. § 11.301 (a).

By "continue to operate," did the legislature mean that voters of the county have a continuing right to petition for an election to increase or decrease the existing taxing authority granted to the Harris County school board? The "applicable chapter" was Chapter 18, and on May 1, 1995, it contained Section 18.07, authorizing a petition for tax election, and Section 18.11 authorizing an election to revoke the tax. This was obviously to give the citizens of the county a measure of control over whether and in what amount they could be taxed. These sections were not repealed, as other parts of Chapter 18 were, and thus were part of the "county system" being carried forward under the express language of Section 11.301 (a). Moreover, if the legislature expressly allowed the Harris County school board to continue operations, it would seem necessarily implied that the public's control over the funding of those operations, as expressed in Sections 18.07 and 18.11, was also continued.

In my opinion Section 11.301 (a) continues in effect the provision for tax election by petition in Section 18.07 and for revocation of the tax in Section 18.11.

2. If the ballot language of the petition does not substantially follow the wording specified in the statute, may the county judge decline to act on the petition?

This question might with equal validity be framed as whether, in the absence of a legally sufficient petition, the county judge has the jurisdiction to order anything. The first sentence of Section 18.07 uses the mandatory verb "shall" in specifying that the county judge must immediately order a tax election, but only if two statutory conditions are satisfied:

(1) the petition must "legally" pray for the authority to levy and collect an equalization tax; and

(2) the petition must fulfill the other requirements of Section 18.07.

Condition (2) would appear to be satisfied since it appears that the requisite number of voters will have signed the petition, and it is clear that a tax rate not in excess of the fifty cent maximum is requested. See Subsections 18.07 (b) and (c). That leaves for analysis the thorny condition (1), which calls for a finding that the petition "legally prays" for an equalization tax. Since the petition is to be received by the county judge, and no other official is mentioned, the implication is clear and necessary that you are the official charged by the law with making that threshold determination. So, what does "legally pray" mean?

Under the Code Construction Act, it is presumed that in the enactment of a statute the legislature intended compliance with the state and federal constitutions, effectiveness of the entire statute, and a just and reasonable result, feasible of execution, in which the public interest is favored over any private interest. TEX. GOV'T CODE ANN. §311.021. Among the factors that may be considered in construing a statute, regardless of any facial ambiguity, are the legislative history, the circumstances under which the statute was enacted, the objects sought to be obtained, and the consequences of a particular construction. *Id.* § 311.023.

In assigning meaning to the statute, a general view of the enactment as a whole must be taken to ascertain the legislative intent, and once that intent is determined, the statute must be construed so as to give effect to the legislative purpose. If the language is susceptible of two constructions, one of which will effectuate and the other defeat the manifest object of the legislature, one must settle on the former and not the latter. *Citizens National Bank of Bryan v. First State Bank, Hearne*, 580 S.W.2d 344, 348 (Tex. 1979); *Bernard Hanyard Enterprises v. McBeath*, 663 S.W.2d 639, 643 (Tex. Civ. App.--Austin 1983, writ ref'd n.r.e.).

Applying these principles, the most straightforward meaning of "legally pray" is that the petition asks for the tax "legally," that is, in a way that complies with and gives effect to the provisions of Chapter 18 as a whole, which include the ballot wording requirements of Section 18.09. If you find that the petition "legally prays" for the tax, then the mandatory verb "shall" vests you with an immediate duty to order the election. If you find that the petition does not "legally pray" for the tax, then the petition would be void and perforce you would have no duty or authority to order anything.

3. Is the form of ballot in the petition substantially the form prescribed by the statute?

Section 18.09 (c) provides

> (c) The form of the ballot shall be substantially as follows: If no specific tax rate was set in the petition, the proposition shall read: "For county tax" and "Against county tax." If a specific tax rate was incorporated in the petition, the proposition shall read; "For county tax not exceeding _____ cents on the $100 valuation" and "Against county tax not exceeding _____ on the $100 valuation."

The form of ballot contained in the petition is

> FOR HARRIS COUNTY DEPARTMENT OF EDUCATION ADDITIONAL TAX NOT EXCEEDING ONE (1) CENT ON THE $100 VALUATION TO BE USED SOLELY AND EXCLUSIVELY FOR EARLY CHILDHOOD EDUCATION PURPOSES.
>
> AGAINST HARRIS COUNTY DEPARTMENT OF EDUCATION ADDITIONAL TAX NOT EXCEEDING ONE (1) CENT ON THE $100 VALUATION TO BE USED SOLELY AND EXCLUSIVELY FOR EARLY CHILDHOOD EDUCATION PURPOSES.

In describing the tax, the form of ballot in the petition differs from the form prescribed in the statute in at least three respects: (1) it injects "Harris County Board of Education" in lieu of "county;" (2) it adds the term "additional" to the description of the tax; and (3) it adds the limitation "to be used solely and exclusively for early childhood education purposes." Are these "substantial" differences?

For our purposes, the closest dictionary definition of the word "substantially" is, "for the most part, essentially."[2] But the rules of statutory construction would not permit giving a meaning to the term that would impair the legislative purpose or the effectiveness of the entire statute, and since it is a tax measure it should be strictly construed. With these considerations in mind, a court would most likely construe "substantially" as permitting only minor variations from the statutory form to accommodate measures permissible under

[2] *See. e.g.*, http://oxforddictionaries.com/us/definition/american_english/substantially

Chapter 18. For example, Section 18.11 expressly authorizes an election to revoke the tax, which would necessarily entail altering the ballot form. If the petition were for a reduction in the tax, then the ballot wording might permissibly be for or against "reduction of the county tax to ____ cents on the $100 valuation." Or if the rate were one cent, it would doubtless be permissible to use the singular form "cent" rather than the plural used in the statute. Perhaps using "Harris County Board of Education" instead of "county" would fall in the category of permissible variations from the statutory form. But the same would not be true of the significant changes in substance made by characterizing the requested tax as "additional" and limiting the use of tax proceeds to "early childhood education."

Describing the requested tax as "additional" is a significant departure from the statute because there is no authority in Chapter 18 for more than one tax. Every statutory reference to the tax in Chapter 18 uses the singular "tax" rather than the plural "taxes." *See, e.g.*, Sections 18.01 ("a countywide equalization tax"), 18.07 ("an equalization tax"). 18.09 ("county tax"), 18.10 ("the tax"), 18.11 ("a tax"), 18.12 ("the countywide equalization tax"), 18.13 ("the countywide equalization tax"), 18.14 ("the equalization tax"), 18.26 ("the tax"), 18.29 ("the tax herein provided for"). Indeed, additional provisions for taxation in the county unit system were repealed by the legislature before continuing Chapter 18 by enactment of Section 11.301 (a) in 1995. *See,* former Sections 18.21 to 18.24 repealed in 1993 and 18.27 repealed in 1979. Nothing in Chapter 18 now refers to or implies that an "additional" tax may be levied.

The attempt in the petition to limit use of the tax to early childhood programs not only reinforces the idea that an entirely separate and unauthorized "additional" tax is being proposed, but it squarely conflicts with the basic statutory scheme of Chapter 18. The concept embodied in the statute is an "additional countywide school district" funded by a single property tax to be deposited in a single "county equalization fund" to be drawn on and expended by an elected county board of education for a county program of education consisting of distribution of funds to eligible school districts for equalization of educational opportunities and the payment of administration expenses. See, Sections 17.031, 18.01, 18.14, 18.26, 18.28. The elected board has broad powers to manage and govern schools to the extent not otherwise provided, to acquire and hold real and personal property, sue and be sued, and receive moneys or funds lawfully coming into its hands, and to perform any other act consistent with law for the promotion of education in the county. *See,* former Sections 17.01, 17.21, 17.31, 18.06, and 18.29. How equalization funds are to be expended is, under these provisions, reserved to the county board and not citizen groups who file petitions for tax elections. If early childhood expenditures can be controlled by the general public through a tax election, then why not vocational education, agricultural education, adult education, special education, or any other sort of educational program that the public imagination might run to?

Moreover, the idea of a special purpose tax election fashioned by citizens of the county is expressly negated in Section 18.26:

> The tax herein provided for shall constitute a part of the school funds of said counties *and shall never be levied, assessed, or collected for any*

purpose other than those herein specified and for the advancement of public free schools in such counties. . . . [Emphasis added.]

There is no purpose of early childhood education specified anywhere in Chapter 18.

In closing, I want you to know that I have examined the cases cited in the attorney general opinion request filed by county attorney Vince Ryan. Although they stand for the general propositions for which they are cited, none of those cases are in point with the statutory scheme involved here, and most of them are distinguishable. For example, many are election contests involving the amendment of city charters, issuance of school bonds, or other measures where the form of ballot was not statutorily prescribed. See, e.g., *Turner v. Lewie*, 201 S.W.2d 86, 91 (Tex. Civ. App.—Fort Worth 1947, writ dism'd) (charter amendment); *England v. McCoy*, 269 S.W.2d 813, 817 (Tex. Civ. App.—Texarkana 1954, writ dism'd) (charter amendment); *Wright v. Bd. of Trustees of Tatum Indep. Sch. Dist.*, 520 S.W.2d 787, 792 (Tex. Civ. App.—Tyler 1975, writ dism'd) (bond issue); *Dacus v. Parker*, 383 S.W.3d 557, 565 (Tex. App.—Houston [14th Dist.] 2012, pet. filed) (charter amendment); *Lightner v. McCord*, 151 S.W.2d 362, 365-66 (Tex. Civ. App.—Amarillo 1941, no writ) (consolidation of districts and assumption of indebtedness). Where the form of ballot was statutorily prescribed, the cases were unanimous in applying the general rule that strict compliance is required, although not in the statutory context we have here. *Davenport v. Commissioners' Court of Denton County*, 557 S.W.2d 530, 532-33 (Tex. Civ. App.—Texarkana 1977, no writ) (local option alcohol); *McGraw v. Newby*, 496 S.W.2d 250, 252 (Tex. Civ. App.—Beaumont 1973, no writ) (local option alcohol); *accord, Branaum v. Patrick*, 643 S.W.2d 745, 749-50 (Tex. App.—San Antonio 1982, no writ) (statutory penalties arising from electoral process); *Reynolds Land & Cattle Co. v. McCabe*, 72 Tex. 57, 59–60, 12 S.W. 165, 165 (1888) (collection of school maintenance tax). None involved the statutory term "substantially as follows" in reference to ballot language.

Moreover, although I have not yet examined mandamus cases in detail, those cited by Mr. Vance suggest that where, as here, the statute calls upon you as county judge to make threshold findings to determine whether a duty to call an election has or has not been triggered, those findings, even if only implied, are reversible only if fraudulent or arbitrary. *See, City of El Paso v. Tuck,* 282 S.W.2d 764, 768 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.); *Hoffman v. Elliott,* 473 S.W.2d 675, 677 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) Further, the time-encrusted standard for granting or denying a writ of mandamus, which has protected public officials for over 150 years, and which is still cited in modern times, see, *In re City of Lancaster*, 220 S.W.3d 212, 215 *supplemented*, 228 S.W.3d 437 (Tex. App.—Dallas 2007, no pet.); *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 425 (Tex.2004); *State Bar of Tex. v. Heard,* 603 S.W.2d 829, 832 (Tex. 1980), is that the writ will issue only to compel the performance of ministerial acts, defined thus:

> The distinction between ministerial and judicial and other official acts seems to be that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the

exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial. *Comm'r of the Gen. Land Office v. Smith,* 5 Tex. 471, 479 (1849).

Accordingly I am very confident that you would be on solid legal ground if you were to conclude that the petition in question does not "legally pray" for a tax authorized by Chapter 18 and that you have no authority or jurisdiction to issue the requested election order.

It is an honor and pleasure to be of service, and please call if you have any questions or if I can be of further assistance.

Very truly yours,

William C. Bednar

WILLIAM C. BEDNAR

PERSONAL

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Law Office of William C. Bednar
The Canyon at Wild Basin
115 Wild Basin Road, Suite 106
Austin, Texas 78746

Telephone: 9512) 494-1177
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Cell: (512) 587-3504
E-mail: wcbednar@bednarlaw.com

EDUCATION

B.A., Political Science, Stanford University, 1962

J.D., University of Texas, 1970

Editor-in-Chief, Texas International Law Journal
Editor's Scholarship, Texas International Law Journal
Comment, 49 Tex. L. Rev. 247 (1971)
Research Assistant, Fulda & Schwartz, Cases and Materials on the Regulation of International Trade and Investment (Foundation Press 1970)
American Jurisprudence Awards: Federal Courts and International Business Transactions
Phi Delta Phi Legal Fraternity

PROFESSIONAL EXPERIENCE

2004-present Of counsel, Powell & Leon L.L.P., 115 Wild Basin Road, Suite 106, Austin, TX 78746. General school law defense practice.

1995-present: Law Office of William C. Bednar, 115 Wild Basin Road, Suite 106, Austin, TX 78746. Solo civil practice, primarily of school law, with emphasis on mediation, preventive counseling, special education, and legal representation of school districts, parents, and students in state and federal administrative, trial, and appellate litigation.

1979-1995: President, Eskew, Muir & Bednar, P.C. Practice limited to school and ad valorem tax law, with emphasis on mediation, preventive counseling, and legal representation in state and federal administrative, trial, and appellate litigation.

1986-1989: Senior Lecturer on Law and the Handicapped, College of Education, University of Texas at Austin

1976-1979: General Counsel, Texas Education Agency

1973-1976: Assistant Attorney General, State of Texas; Chief, Education and Civil Rights Section

1970-1972: Law Clerk, U.S. District Judge Jack Roberts, Austin, Texas

ADMITTED TO PRACTICE

State: All district and appellate courts

Federal: All U.S. District Courts in Texas; U.S. Courts of Appeals for the 5th, 7th, 10th, and District of Columbia Circuits; Supreme Court of the United States.

OFFICES AND MEMBERSHIPS

Fellow, Texas Bar Foundation

Texas State Bar
Chairman, School Law Section, 1980-81
Executive Council, Public Law Section, 1978
District 19 Admissions Committee, 1975-83

Travis County Bar Association
Committee on Federal Judiciary 1978-81

Education Law Association (formerly National Organization on Legal Problems of Education (NOLPE))

President	1988
President-Elect	1987
Vice President	1986
Board of Directors	1982-84, 1985-89
Publications Board	1978-82
State Membership Chairman	1974-81

Planning Committee, University of Texas Annual School Law Conference, 1983, 1989, 1990, 1991, 1992, 1999

Author's Committee, West's Education Law Reporter, 1989

PUBLICATIONS

Chapter 30, Preventive School Law in PRINCIPAL'S HANDBOOK: CURRENT ISSUES IN SCHOOL LAW (NOLPE 1989).

Chapter 12, Preventive School Law in CRITICAL ISSUES IN EDUCATION LAW: THE ROLE OF THE FEDERAL JUDICIARY IN SHAPING PUBLIC EDUCATION (NOLPE/Danforth Foundation 1988).

Preventive Law: Minimizing Legal Risks Through Foresight and Planning, 2 TEX. SCHOOL AD'M'R'S LEGAL DIGEST No. 8 at 4 (1986).

A Survey of the Texas Reform Package: House Bill No. 72, 16 ST. MARY'S L.J. 813 (1985).

Preventive School Law, School Law Update: Preventive School Law 1-14 (NOLPE 1984).

Comment, 49 TEX. L. REV. 247 (1971).

LOCAL SCHOOL ACTIVITIES: (Austin Independent School District)

Executive Committee, Forming the Future Project 1982
Project A+ Citizen's Advisory Committee
(Empowerment Team) 1989-90
Lay Citizens Textbook Advisory Committee 1990-91
Representative--City-wide Council of PTAs 1990-91
Lee Elementary PTA 1988-91
Co-President 1991-92
Co-Vice President 1990-91
Carnival Co-Chairman 1989

COMMUNITY INTERESTS

Episcopal Church of the Good Shepherd, Austin, Texas 2003-present
Worship Leader, 2008-present

Rotary International
Rotary Club of West Austin 1971-2002
Capitol of Texas Rotary Club 2003-present

North University Neighborhood Association, 2002-present
President 2006-2010

University United Methodist Church, Austin, Texas 1992-2001
Senior Lector 1993-1998

Capital Area Rehabilitation Center,
Board of Directors 1975-1997
President 1981-82

Texas Easter Seal Society
Board of Directors, 1985-1994
Secretary 1987
Chairman-elect 1988
Chairman 1989-1991

National Easter Seal Society
House of Delegates 1989-1990, 1992-1994
Membership & Organizational Structure Committee 1994

Austin YMCA
Board of Directors, 1980-87
President 1983-84

St. George's Episcopal Church, Austin, Texas
Layreader 1977-1980
Senior Warden 1973-74
Vestry 1972-74
Chairman, St. George's School Board, 1977

Zachary Scott Theater Center
Board of Directors, 1973-78

MILITARY

United States Marine Corps
Regular Infantry Officer 1962-67, Vietnam 1965-66
Reserve Infantry Officer 1967-84
Retired, 1984

PAPERS AND SPEAKING ENGAGEMENTS

"School District Closure—A Case Study," 8th Annual Advanced Texas Administrative Law Seminar, University of Texas School of Law, Austin, Texas August 2013.

"I'm Mad as Heck and I'm Not Going to Take it Anymore!": Parental Concerns that Lead to Hearings, 12th Annual Assessment Boot Camp, National Educators Law Institute, Austin, Texas June 2013.

"Desegregation of Higher Education in Texas: What Does the Future Hold?" 11th Annual Texas Higher Education Law Conference, University of North Texas, Denton, Texas April 2007

"The Fourth Amendment: Search and Seizure on the Higher Education Campus," 10 Annual Legal Conference on Higher Education, University of North Texas, Denton, Texas, April 2006

"Privacy Rights and School Administration, Lorman Seminar, *Liability in Texas Schools*, Austin, TX, May 2005

"Leasing And Purchasing Personal Property By Public School Districts," University Of Texas School of Law, 14th Annual School Law Conference, Austin, TX, March 1999

"Drug Testing for Athletes and Others," Education Law Association Winter Seminar, Elkhorn Resort, Sun Valley, Idaho, February 1999

"Sexual Harassment of Students By Students," Education Law Winter Seminar, Coeur d'Alene, Idaho, February 1997

"Federal Liability for Student Claims," NOLPE Education Law Spring Ski Seminar, Snowbird, Utah, March 1994

"Legal Aspects of School Boundary Changes," 7th Annual School Law Conference, University of Texas School of Law, March 1992

"Current Theories of Teacher Dismissal," National Organization on Legal Problems of Education (NOLPE) Ski Seminar, Park City, Utah, March 1991

"Employees, Board Members, and the Law," National School Boards Association Summer Conference, Reno, Nevada, July 1989

"Lease Purchase and the Financing of School Facilities and Equipment," 5th Annual School Law Conference, University of Texas School of Law, March 1989

"Legalization of American Education and Consequences for Lawyers, Educators, and School Systems," 10th Annual Spring Conference for School Administrators and Supervisors, North Texas State University, April 1988

"Student Expression Under the First Amendment," NOLPE Education Law Winter Conference, Breckenridge, Colorado, March 1988

"Lease Purchase and the Financing of School Facilities," 3d Annual School Law Conference, University of Texas School of Law, March 1988

"Conducting the Annual ARD: Due Process for Handicapped Children," Continuing Inservice for Instructional Leadership, Region V Education Service Center, April 1987

"Where Are We Now and What Does the Future Hold" (panel discussion), School Law Conference, University of Texas School of Law, March 1986

"Legal Implications of the Career Ladder," First Annual Principals' Academy, Texas A&M University, July 1985

"Local Funding," Education and the Law Conference, University of Texas School of Law, June 1983

"Amendments to Hearing Rules for Handicapped Students," School Law Section, Texas State Bar Annual Convention, June 1979

"Federal Investigations and Compliance Reviews," School Administrators Advisory Conference on Education, Texas Education Agency, January 1979

"Copyright," Conference on Student Personnel Administration in Higher Education, The University of Texas School of Law and Southwest Association of Student Personnel Administrators, June 1978.

"Hearings Concerning Handicapped Students," School Law Section, State Bar of Texas Annual Convention, June 1978

"Education of the Handicapped," Seventh Annual School Law Conference, University of Houston, March 1978

"Making Decisions on Alien Students, A Session with Office of the General Counsel," School Administrators Advisory Conference on Education, Texas Education Agency, January 1978

"Legal Seminar on Problems in Public Education," Co-sponsored by the Office of the General Counsel, Texas Education Agency, and Regional Service Centers, presented at ten educational service centers during 1977-78

"The Administrative Appeals Process," School Administrators Advisory Conference on Education, Texas Education Agency, January 1977

"Legal Aspects of Faculty Rights," Texas Association of Junior College Instructional Administrators, June 1976

"The Rights of Teachers: Four Perspectives," Texas Junior College Teachers Association Annual Convention, March 1976

"Legal Implications of Student Union Management--The Viewpoint of the Attorney General's Office," Association of College Unions-International, July 1975

"Federal Funds and Programs--The Impoundment Cases," Texas Association of School Boards and Texas Association of School Administrators Joint Annual Convention, October 1974

"Legal Aspects of Student Union Management," Association of College Unions International, Region 12, July 1974

"Faculty Termination Guidelines," Forum on Academic Due Process, Texas Junior College Teachers Association, June 1974

"Eighteen-Year-Old Majority and its Implications for Institutions of Higher Learning," Conference on Student Personnel Administration in Higher Education, University of Texas School of Law and Southwest Association of Student Personnel Administrators, June 1974

"Implications of the Texas Eighteen-Year-Old Majority Act," Southwest Association of College and University Housing Officers, February 1974

TAB L

TEXAS Conference of
Urban Counties

500 West 13th Street
Austin, TX 78701

Phone: 512.476.6174
Fax: 512.476.5122

www.cuc.org

August 22, 2013

Opinion Committee
Office of the Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Re: **Whether a county judge may deny a petition for a county department of education election (RQ-1144-GA)**

Dear Sir/Madam:

The member counties of the Texas Conference of Urban Counties have an interest in the above-referenced opinion request, and therefore submit this brief for your consideration.

In the instant scenario, the Harris County Judge cannot call the election pursuant to the petition that is being circulated in the community. To do so would result in an invalid election.

Section 18.09, Education Code (long repealed by still in effect for the Harris County Department of Education), requires the ballot language for an equalization tax of an amount certain as set forth in the election petition to be "substantially" as follows: "For county tax not exceeding ___ cents on the $100 valuation" and "Against county tax not exceeding ___ cents on the $100 valuation."

Nothing in Chapter 18, Education Code, nor any other statute, permits the voters to limit the expenditure authority of the board of trustees of the Harris County Department of Education. To the contrary, if approved by the voters, equalization tax revenue must be distributed as specified by Section 18.14, Education Code. Thereafter, the common and independent school districts of the county are free to use the funds in any legally permitted manner. A county-wide election held for the benefit of the Harris County Department of Education cannot direct the expenditure authority of the several common and independent school districts within Harris County.

The rub in the instant scenario is that the petition that will be used to require the Harris County Judge to call an election on the equalization tax purports to limit the purpose for which equalization tax revenue may be used. There is no basis in statute for such limitation – either to permit the Harris County Department of Education to impose restrictions on the use of equalization tax revenue, or to bind the boards of trustees of common and independent school districts to the terms of the petition language. As a result, the limitation cannot be given effect.

Texas case law relevant to this matter is scant. However, courts in this state have recognized the need for petition and ballot language to be the same in order for an election to be valid. See, *Smith v. Counts*, 282 S.W.2d 422 (Tex.Civ.App. – El Paso 1955, no writ). At the same time, the common law requires that the ballot proposition identify the measure "with such definiteness and certainty that the voters are not misled." *Reynolds Land & Cattle Co. v. McCabe*, 72 Tex. 57, 12 S.W. 165, 165-66 (Tex. 1888); *see also Bischoff v. City of Austin*, 656 S.W.2d 209, 212 (Tex. App.--Austin 1983, writ ref'd n.r.e.), *cert. denied* 466 U.S. 919, 80

L. Ed. 2d 172, 104 S. Ct. 1699 (1984)(same); *Wright v. Board of Trustees of Tatum Indep. Sch. Dist.*, 520 S.W.2d 787, 792(Tex. Civ. App.--Tyler 1975, writ dism'd) (proposition should constitute a fair portrayal of the chief features of the measure in words of plain meaning so that it can be understood).

The Harris County Judge cannot order an election with a ballot proposition that reflects the petition language in the instant scenario for the simple reason that the language purporting to limit the use of equalization tax revenue cannot be enforced. Thus, the ballot language would be misleading, and the election invalid. Likewise, a ballot proposition that differs substantially from the petition language would also result in an invalid election.

Thank you for your kind attention to this matter. Should you have any questions or desire additional information, I may be reached at (512) 476-6174 or at john@cuc.org.

Sincerely,

John B. Dahill
General Counsel

TAB M

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, personally appeared Stan Stanart who, after being duly sworn, stated as follows:

1. My name is Stan Stanart. I am over 18 years of age, of sound mind, and competent to make this affidavit. I have personal knowledge of the facts stated herein and they are true and correct.
2. I am the duly elected County Clerk of Harris County, Texas and my office address is 201 Caroline, Suite 460, Houston, Texas 77002.
3. Federal law requires that the ballot for Federal elections be mailed no later than 45 days before the election. Due to the importance, the volume and desire to provide consistency, quality and timely delivery of mail ballots, the Harris County Clerk's office follows the more stringent time requirements of the Federal law for all elections conducted by Harris County. Therefore, for the November 5, 2013 election, it is necessary to mail ballots to military and overseas voters no later than September 21, 2013.
4. In order to have the ballot ready by such date, I need to know the exact language for any proposition to be included on the ballot no later than 9:00 a.m. on September 9, 2013.
5. After that time on September 9, 2013, I will be required to translate the ballot into three additional languages; Spanish, Vietnamese and Mandarin Chinese. In addition, an audio ballot must be prepared for disabled voters or voters unable to read the ballot. After all translations are complete, a "logic and accuracy" test must be conducted to test the collection and tabulation of paper ballots and electronic ballots that will be used during the election. Finally, an additional period of time is necessary in the event an error is discovered during the testing period.

Further Affiant sayeth not.

SIGNED this 29th day of August, 2013.

Stan Stanart

§

SUBSCRIBED AND SWORN TO before me by Stan Stanart, this 29th day of August, 2013, to certify which witness my hand and seal of office.

VICKY MACKAY
Notary Public
STATE OF TEXAS
Commission Expires 02-25-2014

Vicky Mackay
Notary Public in and for the State of Texas

TAB N

ORAL ARGUMENT REQUESTED

No. 14-13-00748-CV

IN THE COURT OF APPEALS FOR
THE FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

IN RE JONATHAN DAY, ET AL., RELATORS

AFFIDAVIT OF MIKE STAFFORD

GARDERE WYNNE SEWELL LLP

Katharine D. David
State Bar No. 24045749
kdavid@gardere.com
Mike Stafford
mstafford@gardere.com
State Bar No. 18996970
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
Telephone: (713) 276-5500
Facsimile: (713) 276-5555

ATTORNEYS FOR RESPONDENT, THE HONORABLE ED EMMETT, COUNTY JUDGE OF HARRIS COUNTY

AFFIDAVIT OF MIKE STAFFORD

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned Notary Public, on this day personally appeared Mike Stafford, who being by me duly sworn on his oath, said that:

1. My name is Mike Stafford. I am over the age of eighteen, of sound mind, have never been convicted of a crime involving moral turpitude, and am competent to make this Affidavit. I am employed by the law firm of Gardere Wynne Sewell LLP, located in Houston, Texas. By virtue of my position as an attorney for Respondent, The Honorable Ed Emmett, County Judge of Harris County, ("Emmett") in the above-entitled cause, I have personal knowledge of the facts set forth in this Affidavit, all of which are true and correct.

2. Tab J to the Response to Petition for Mandamus is a true and correct copy of the petition circulated by Citizens for School Readiness in May of 2013.

3. Tab L to the Response to Petition for Mandamus is a true and correct copy of the Texas Conference of Urban Counties' letter opinion submitted to the Office of the Attorney General.

FURTHER AFFIANT SAYETH NOT.

Mike Stafford

SUBSCRIBED AND SWORN BEFORE ME on September 3, 2013.

SYLVIA MARTINEZ
Notary Public, State of Texas
Commission Expires 04-26-2016

Notary Public, State of Texas